

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

A. Bates Butler, as Trustee
of Construction Materials Co.,
Appellant,

vs.

City of Tucson, et. al.,
Appellees.

FEB 10 1967

The Bank of Tucson,
Appellant,

vs.

Pacific National Insurance Company,
City of Tucson, Martin Construction
Company and A. Bates Butler,
Appellees

No. 20390

Martin Construction Co. and
Pacific National Insurance Co.,
Appellants

vs.

Bank of Tucson, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

BRIEF FOR APPELLANT A. BATES BUTLER

FILED

FEB 18 1956

WM. B. LUCK, CLERK

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on the 26th day of May, 1965, by the United States District Court for the District of Arizona.

This appeal is brought under the jurisdiction established in Section 24 of the Bankruptcy Act, 11 U.S.C.A. Section 47.

INTRODUCTION

For the sake of clarity, A. BATES BUTLER, Trustee in Bankruptcy of Construction Materials Company, Bankrupt, Appellant, shall hereinafter be referred to as "Trustee." CONSTRUCTION MATERIALS COMPANY, bankrupt, will hereinafter be referred to as "Bankrupt." The CITY OF TUCSON, Appellee, will hereinafter be referred to as "City." THE BANK OF TUCSON, Appellee, shall hereinafter be referred to as "Bank," and MARTIN CONSTRUCTION COMPANY, Appellee, shall hereinafter be referred to as "Martin."

The Appellant after thorough research has come to the conclusion that the Statement of Points that Appellant intends to rely upon under Counts I and II of the Complaint should be abandoned and therefore this brief will contain no questions or argument as to the points contained in Count I and II and this brief will be limited to the Question presented under Count III of the Complaint.

STATEMENT OF THE CASE

This case is concerned with whether or not the Trustee has title to certain bonds under Section 70(a) of the Bankruptcy Act, or whether Martin has an equitable lien upon such bonds pursuant to Conclusion of Law Numbers 12 and 13.

It is the contention of the Trustee that Martin does not have an equitable lien under the laws of the State of Arizona.

The Trustee instituted this action seeking to recover preferences accorded in violation of Sections 60 and 70 of the Bankruptcy Act.

FACTS OF THE CASE

Construction, a corporation, and the City entered into an agreement called the El Campo Estates Addition Paving Improvement Construction Contract (Joint Exhibit 1), on or about the 10th day of September, 1962.

On or about the 22nd day of October, 1962, Construction assigned to First Municipal Investments of Arizona, Inc., all of its right, title and interest in and to the El Campo District Contract, together with all diagrams, warrants, assessments, monies, bonds and payments of every kind and nature due or to become due or thereafter issued or paid, under or pursuant to the aforesaid contract. (The assignment is Joint Exhibit 2).

On or about the 8th day of May, 1963, Construction and Martin executed a letter agreement (Joint Exhibit 32) wherein Construction agreed to assign approximately \$68,754.42 of certain bonds which are created pursuant to Arizona Revised Statutes Title 9, Chap. 6 authorizing the creation of improvement districts.

On or about September 6, 1963, Martin notified the City by letter (Joint Exhibit 21) that it claimed \$68,754.42 in the amount of bonds to be issued in connection with the aforesaid contract.

On November 22, 1963, a petition for relief under Chapter XI of the Bankruptcy Act was filed voluntarily by Construction.

SPECIFICATION OF ERROR RELIED UPON

The District Court erred in Conclusions of Law Numbers 12 and 13. These conclusions found that Martin has an equitable lien against the bonds described in Finding of Fact Number 21, and that Martin is entitled to receive and apply to the payment of the sum due to it as found in Findings of Fact Number 14 such Wilmot District Improvement Bonds as remain in the registry of the District Court after delivery to Bank of the amount thereof to which the Bank is entitled by virtue of Conclusion of Law Number 11. The Court erred in not finding that the Trustee has full legal and equitable title to the bonds in question.

QUESTION PRESENTED

Is an agreement to assign certain contractual rights sufficient to create an equitable lien upon such contractual rights?

ARGUMENT

The Trustee's position is that a preferential payment to Martin has been authorized by the District Court's failure to uphold the Trustee's rights under Section 70(a) of the Bankruptcy Act.

As to what law governs the question of equitable liens, it is the Trustee's position that the Court must look to the applicable state law. *Erie R.R. v. Tompkins* (1938), 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

Arizona has discussed the creation of an equitable lien in two early cases: *Stephen v. Patterson* (1920), 21 Ariz. 308, 188 Pac. 131, and *Moeur v. Farm Builders Corp.* (1929), 35 Ariz. 130, 274 Pac. 1043. The *Stephen* case stated, at 21 Ariz. 311, 188 Pac. 132:

“We recognize the well-settled and familiar principle in equity that where it is clearly shown that the intention of the parties to a transaction is to give security for a debt or obligation upon some particular property, however informally such intention may be expressed, equity will in an appropriate proceeding declare an equity mortgage or lien to exist, and by its decree enforce the same as against such property in satisfaction of the debt of obligation.”

In the *Stephen* case, the language creating the equitable lien was clear, to wit: “. . . and a special lien is created hereby on such property to secure the payment of this obligation.” (21 Ariz. 309, 188 Pac. at 132). The intention of the parties in the *Stephen* case was not hard to determine.

The *Moeur* case, *supra*, cited the language from the *Stephen* case as set forth above, and went further in stating, at 35 Ariz. 138, 274 Pac. 1045:

“It is the law that a promise or agreement to pay out of a particular fund does not give to the promisee an equitable assignment or a lien upon such fund, or the property from which the fund is obtained.”

Jones, Liens, 3d. Edition, Vol. 1, § 50:

“To constitute an equitable lien on a fund, there must be some distinct appropriation of the fund by the debtor, such an assignment or order that the creditor should be paid out of it. It is not enough that the fund may have been created through the efforts and outlays of the party claiming the lien. It is not enough that a debtor authorizes a third person to receive a fund and to pay it over to a creditor.”

In other words, there must be something more than a mere promise to assign a fund. Jones goes on to say:

“An agreement between a debtor and creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund”

In the case of *Wilson v. Poland* (Tex., 1929), 14 S.W.2d 890, the issue of equitable assignment was brought before the court by a father whose son had transferred a claim to the father in writing and by word of mouth. The party to be charged was notified of this assignment. The Texas court stated that the appellant had rested under the burden of showing:

- a) That his son had made to him for his use an absolute appropriation of the Wilson claim.
- b) That the assignment was of the whole of the claim or of specific sum or fixed percentage thereof.
- c) That his son had parted with all control over the claim.

The court then stated that there was no absolute appropriation; no fixed sum or percentage was designated, nor did the son part with control of the claim, but continued trying to collect it. (The son hired an attorney for the purpose of collection and had a suit instituted thereon in his own name, wherein he asserted ownership in himself.)

The *Moeur* case, *supra*, further held that the burden of proof is on the person claiming an equitable lien to show the existence of the agreement for the alleged equitable lien by a preponderance of the evidence.

In the present case, the assignment was made only by Exhibit 32, dated May 8, 1963, to wit:

“Construction Materials Company agrees to assign approximately \$68,754.42 of the bonds on this project to Martin Construction Company.”

Neither in the Martin notice, Exhibit 21, nor in the affidavit, Exhibit 30, has there ever been any mention of an assignment — nor was such ever alluded to during the trial of the case. Martin’s demand has never been based upon an assignment; Martin claims merely as a subcontractor. (Exhibit 21)

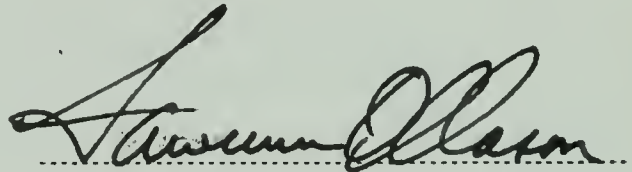
Therefore, applying the law as set forth to Martin’s situation herein, it is not possible to sustain the conclusion that Martin has an equitable lien upon the balance of the bonds for the following reasons:

- A) Martin has failed to sustain the burden of proof that there was or has been an assignment of anything by Construction.
- B) The Martin claim is analogous to the foregoing *Wilson* case
 - 1) There has never been an absolute appropriation of the claim by Martin.
 - 2) There was not an assignment of the whole or the balance due after the Bank was paid.
 - 3) There was no assignment of a specific sum.
 - 4) Construction did not part with control of the warrant; rather it attempted collection.
 - 5) Martin filed a demand upon the City on the basis of certain Arizona Revised Statutes pertaining thereto, not on the basis of an assignment.

CONCLUSION

The only grounds upon which Martin can base any claim of an assignment is a mere promise to assign and not an actual assignment. The most which the breach of this promise does is create an action in law for breach of contract. It is not sufficient to form the basis of an equitable lien. Further indication of the absence of an equitable lien here is that at no time was anything given to Martin that placed Martin in control of the bonds in question.

It is respectfully submitted that the judgment of the District Court be reversed and that title be held to have vested in the Trustee free and clear of any equitable lien of Martin.

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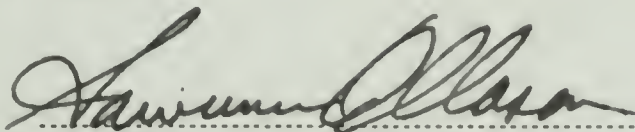
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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in cursive script, reading "Lawrence Ollason", written over a horizontal dotted line.

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